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Supreme Court of the United States

October Term, 1976

No. 76-336

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, the National Association of Regulatory Utility Commissioners (NARUC), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") entered in this proceeding on April 14, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported,[1] appears at Appendix A to this

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[1]However, excerpts of the opinion appear at 44 U.S.L.W. 2513 (May 11, 1976).

petition.[2] The *Memorandum Opinion and Order* of the Federal Communications Commission (FCC), which is reported at 45 FCC 2d 204 (1974), appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 14, 1976. A timely petition for rehearing was denied on June 8, 1976, by an order which appears at Appendix B, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming an FCC declaratory order preempting State authority over the interconnection of terminal equipment used in intrastate and exchange communications when Sections 2(b) and 221(b) of the Communications Act of 1934, as amended, prohibit the FCC from asserting jurisdiction over facilities used in intrastate and exchange communications?

2. Whether the Court of Appeals erred in affirming the FCC declaratory order preempting State authority over the interconnection of terminal equipment by relying on an interpretation of Sections 2(b) and 221(b) of the Communications Act that would render the reference in those sections to "facilities" meaningless?

3. Whether the Court of Appeals erred in affirming the FCC declaratory order preempting State authority over the interconnection of terminal equipment by predicating its decision on a misapprehension of Sections 2(b) and 410(c) of the Communications Act and of previous FCC decisions?

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[2]The appendices are separately bound in a companion volume hereinafter cited as "Pet. App."

STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C., §151 *et seq.* (1970).

2. Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (1970). Relevant sections of the statutes are set out in Appendices D and E, respectively.

STATEMENT OF THE CASE

In this case the NARUC seeks review of a decision of the Court of Appeals which affirms an order of the FCC in which the Commission determined that it had authority under the Communications Act of 1934 to preempt State regulation of terminal equipment interconnected with local telephone exchanges.

A. Background

1. Identity of Petitioner

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the regulation of utilities and carriers. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such communication service and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable. Members of the NARUC have traditionally regulated the station service offerings of the telephone companies at the State level. The FCC decision here under consideration would take away the State regulators' power to

do this and, thus, weaken their efforts to protect intrastate and exchange telephone users.

2. Regulatory Plan of the Communications Act of 1934

In 1934 Congress enacted the Communications Act establishing the FCC and giving it authority, with certain exceptions, to regulate interstate and foreign communications. 47 U.S.C., §§151, 152(a). Congress specified, however, that (subject to the radio licensing provisions of Section 301 of the Act) nothing in the Act gave the FCC jurisdiction with respect to "charges, classifications, practices, services, *facilities*, or regulations for or in connection with intrastate communications services by wire or radio of any carrier . . . ." 47 U.S.C. 152(b)(1). (Emphasis supplied.) Further, Congress provided in Section 221(b) of the Act:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority. [47 U.S.C. 221(b).]

The plain language of Sections 2(b)(1) and 221(b) of the Act indicates Congress' clear intent to preserve authority over intrastate communications to the States. The legislative history of the Act affirms that this was the intent of Congress. It demonstrates that these provisions were included in the Act in order to alleviate concerns that State

regulation of telephone service would be overridden by the FCC as State regulation of railroads was by the ICC[3].

3. Prior Decisions of the FCC

The division of regulatory authority established by the Communications Act has been followed for many years. The FCC has set rates for interstate telephone service and considered applications for interstate lines and facilities; State agencies have set the rates for intrastate and exchange service and governed the terms under which terminal equipment is provided and connected to the local exchange. In earlier decisions where the FCC considered the attachment of customer-provided equipment to the telephone network in connection with interstate communications, the Commission expressly recognized State jurisdiction over the connection of such equipment with intrastate communications.[4]

In the *Carterfone* decision[5], which the FCC relied on heavily in its decision below, the Commission held invalid provisions of interstate tariffs which prohibited the use of the Carterfone, a device used to interconnect radio communication systems to the telephone network. The FCC concluded that the Carterfone fills a need and does not adversely affect the telephone system, and, on this basis ruled that tariff regulations prohibiting the use of the device *in interstate or foreign* telephone service should be rescinded. 13 FCC 2d at 441.

As in the earlier decisions involving customer-supplied equipment, the FCC limited the scope of the *Carterfone*

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[3]See Remarks of Senator Dill, 78 *Congressional Record* 8823 (May 15, 1934).

[4]*Use of Recording Devices*, 11 FCC 1033 (1947); *Jordaphone*, 18 FCC 644 (1954); *Hush-A-Phone*, 22 FCC 112 (1957).

[5]*Carterfone*, 13 FCC 2d 420 (1968), *reconsideration denied*, 14 FCC 2d 571 (1968).

decision to interstate and foreign telephone service, and not intrastate service. Further, the FCC limited its ruling to interconnection of services to the telephone system and did not include replacement of parts of the telephone system[6].

B. Proceedings Before the FCC Below

Subsequent to the *Carterfone* decision there was an increase in the use of customer-provided equipment. This resulted in the development of a growing concern on the part of many State regulators that the continually increasing substitution of customer-provided equipment for telephone company-provided equipment would adversely affect residential telephone users with regard to the quality and cost of their telephone service.

The NARUC was prompted by this concern to conduct a broad evidentiary inquiry into the economic impact of increased competition in the telecommunications industry. On May 15, 1974, the NARUC issued the results of its study in a report entitled "An Investigation Into the Economic and Quality of Service Impact on Telephone Service Subscribers Resulting From the Interconnection of Subscriber-Provided Equipment to the Public Switched Telephone Network, and From Competition by the Specialized Common Carriers in the Provision of Telecommunication Services, Report after Investigation."

In this report, the NARUC Committee on Communications concluded that there will be a substantial adverse economic impact on local exchange telephone subscribers resulting from interconnection (principally of PBX and KTS). The NARUC Committee found that the competition of interconnection would result in minimum revenue losses to the telephone companies of approximately

[6]See, In the Matter of AT&T "Foreign Attachment" Tariff Revisions, 15 FCC 2d 605, 609-610 (1968), *rec. den.* 18 FCC 2d 871 (1969).

$360 million to $740 million annually by 1980, and $900 million to $1.0 billion annually by 1984. The Committee further concluded that residential subscribers would be forced to bear the cost of the interconnection by paying increased residential exchange rates to make up for the revenue lost to competition by the telephone companies. This is because residential subscribers are the only class of telephone users that would not be able to react to increased rates by turning to a competitor of the telephone companies for service.

A concern about the impact of interconnection on the ordinary home telephone user also prompted the North Carolina Utilities Commission to initiate an investigation and proposed rulemaking as to:

> . . . the economic and service impact that interconnection is or will have in North Carolina or what changes, if any, should be made in the method of providing telephone service and establishing telephone rates.[7]

On June 29, 1973, as a result of this investigation, the North Carolina Utilities Commission issued notice of a proposed rulemaking which provided, *inter alia:*

> The telephone company shall own, service and be fully responsible for and accountable to the Utilities Commission and to its customer for adequate service and maintenance of all equipment used in telephone service in North Carolina.[8]

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[7] *Investigation of Interconnection of Subscriber-Provided Equipment With the Telephone Network of Telephone Companies Under the Jurisdiction of North Carolina Utilities Commission.* Docket No. P-100, Sub. 31, Order of Investigation, February 2, 1973, p. 12.

[8] *Id.*, Proposed Rule R9-5(a), June 29, 1973.

The North Carolina Commission did not enact the rule, but simply initiated an investigation to determine if the proposal should be implemented in the public interest.

At nearly the same time, the Attorney General of Nebraska issued an advisory opinion concerning the regulation of interconnection at the request of the Nebraska Public Service Commission. The Nebraska Attorney General stated in his opinion that: (1) FCC decisions such as *Carterfone* did not supersede the Nebraska PSC's constitutional and statutory authority over intrastate interconnection matters, and (2) businesses such as hotels or motels which provide privately-owned terminal equipment for their own use and for the use of guests or tenants and which provide access through interconnection to the switched public telephone network are engaged in service "for-hire" within the meaning of Nebraska law, and therefore must be certificated by the Nebraska PSC.[9]

Despite the preliminary nature of the above-referred to proceedings in North Carolina and Nebraska, the North American Telephone Association (NATA) and certain of its members generally doing business in those two States, filed a petition before the FCC which precipitated this proceeding. The petition, filed on August 8, 1973, requested the FCC to invoke the declaratory order provisions of the Administrative Procedure Act, 5 U.S.C. §554(e), and rule that States are preempted and precluded from regulating interconnection matters insofar as intrastate telephone service is concerned, and further, that the use of customer-provided terminal equipment under any circumstances cannot constitute common carriage subject to Federal or State regulation.

By Public Notice dated August 15, 1974 (Mimeo No. 05725) the FCC first set the petition for public comment by

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[9]Letter dated July 18, 1973 from Nebraska Attorney General to Nebraska Public Service Commission.

interested parties but subsequently, by Memorandum Opinion and Order adopted September 6, 1973, and released September 7, 1973, FCC 73-901, 38 Fed. Reg. 25713 (September 14, 1973), 43 FCC 2d 487 (1973), the FCC designated the issues raised by the petition for summary resolution *en banc*.

After reciting the foregoing background, the FCC concluded:

> We are of the opinion that the above described advisory opinions of the Attorney General of the State of Nebraska and Rule R9-5 proposed by the North Carolina Utilities Commission have created uncertainty concerning whether and, if so, to what extent actions which we have taken, and policies which we have promulgated, in *Carterfone* and related cases with respect to interconnection of customer-provided communications equipment to the nation-wide switched public telephone network have pre-empted state action in this area. We are of the further opinion that such uncertainty and the legal issues raised can and should be promptly resolved on the basis of briefs and oral argument before the Commission. (FCC 73-901, p.5.)

Initial briefs by interested parties were filed on October 1, 1973, reply briefs were filed on October 23, 1973, and oral argument before the FCC *en banc* was held on October 30, 1973. No evidentiary hearing or other formal or informal factfinding procedure was at any time employed by the FCC. By Memorandum Opinion and Order adopted January 31, 1974, and released February 4, 1974 (Pet. App. C), the FCC issued its decision.

The FCC ruled that it had "primacy" in authority on interconnection matters. The Commission based the ruling on its *Carterfone* decision and other prior decisions, and

held that it had preempted State regulation of the interconnection of terminal equipment used in both intrastate and exchange service. (Pet. App. C .)

D. The Decision Below

The NARUC and several other parties sought review of the FCC order by the Court of Appeals pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342. The appeals were consolidated before the U.S. Court of Appeals for the Fourth Circuit. On April 14, 1976, the Court handed down a 2-1 decision affirming the FCC order. (Pet. App. A.)

The Court's opinion, written by Judge William H. Hastie, held that the FCC's declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Communications Act of 1934, as amended. Judge Hastie found that although Section 2(b) of the Act does deprive the FCC of jurisdiction over local services and facilities that are "separable from and do not substantially affect the conduct or development of interstate communications," it does not sanction any State regulation that would encroach on the FCC's authority to regulate interstate and foreign communications. (Pet. App. A, p. 13a.)

In affirming the FCC's order, Judge Hastie reasoned that if a State could restrict the interconnection of terminal equipment in a manner contrary to interstate tariffs, the FCC would be frustrated in the exercise of its plenary jurisdiction over interstate and foreign communications. He concluded, "The Commission must remain free to determine what terminal equipment can safely and advantageously be interconnected with the intrastate communications network and how this shall be done." (Pet. App. A, p. 13a.)

Judge H. Emory Widener filed a dissenting opinion from that part of the Court's opinion holding that the FCC has primary jurisdiction over the interconnection of terminal equipment. Judge Widener concluded that Section 221(b) of the Communications Act provides for State regulation of the facilities used in local exchange service even though the facilities might also be used in interstate communication. (Pet. App. A, p. 24a.)

The NARUC and several other petitioners before the Court of Appeals each filed a petition for rehearing with the Court. On June 8, 1976, however, the petitions for rehearing were denied. The petitions were denied by a 1-1 vote with Judge Widener dissenting (Judge Hastie died on the day the Court's decision in the case was delivered). Rehearing *en banc* was unavailable because the other Judges of the Fourth Circuit had disqualified themselves.

REASONS FOR GRANTING THE WRIT

The FCC order preempting State jurisdiction over the interconnection of terminal equipment is of fundamental importance to all telephone users in the United States. Under Sections 2(b) and 221(b) of the Communications Act of 1934, as amended, the regulation of terminal equipment has been left to the States until this decision.

In the proceeding below, the FCC, for the first time attempted to distinguish the power of the States to regulate intrastate rates and services from the power to regulate the terms and conditions under which terminal equipment can be interconnected. Nonetheless, the regulation of rates, services and equipment are unquestionably and directly related to one another. Economic studies, including that by the NARUC (discussed below at p.6), have demonstrated that the increased use of customer-provided terminal equipment will divert revenues from the telephone companies and lead to increased charges for local residential users.

If the decision below is allowed to stand, the division of regulatory authority between the Federal Government and the States, established in the Communications Act and followed for over forty years, will be set aside. The FCC will have been permitted to usurp State authority not only without a clear expression of intent by Congress that it should do so, but in direct contradiction of the Congressional intent expressed in the plain language of Sections 2(b) and 221(b) of the Communications Act.

Further, if the decision of the Court of Appeals stands, the FCC will have preempted State authority in an area primarily of local concern and effect which should be left to regulation by the States. The economic effect of the increased use of customer-provided terminal equipment on local rates and services will naturally vary according to local conditions and circumstances. The ability of the States to protect the public against adverse effects will be weakened by the preemption of State authority to regulate the interconnection of terminal equipment.

The NARUC, therefore, respectfully submits that this Court should review the decision of the Court of Appeals because of the fundamental importance of this case, its impact on Federal-State relations, and the fact that the decision of the Court of Appeals is based on an interpretation of the Communications Act that never has been, but should be reviewed by this Court.

I. THE DECISIONOF THE COURT OF APPEALS AFFIRMING THE FCC'S PREEMPTION OF STATE JURISDICTION IS CONTRARY TO THE COMMUNICATIONS ACT OF 1934

A. The Court of Appeals Decision Contradicts the Plain Language of the Communications Act.

The NARUC respectfully submits that the Court of Appeals decision affirming the FCC's assertion of primary authority over the interconnection of terminal equipment with the telephone network is in conflict with the applicable law and should, therefore, be reviewed by this Court. Specifically, the decision is contrary to Sections 2(b) and 221(b) of the Communications Act of 1934, as amended, which reserve to the States authority over intrastate and exchange communications services and facilities (as well as charges, classifications, practices, and regulations) in connection with such services.

In its opinion, the Court of Appeals recognized the existence of the exemptions from FCC jurisdiction contained in Sections 2(b) and 221(b) of the Act. (Pet. App. A, pp. 13a, 17a-18a.) It further recognized that the terminal equipment under consideration would be used in intrastate and exchange services such as those referred to in Sections 2(b) and 221(b).

The Court of Appeals, however, found that the language of these sections conflicts with the language of Section 1 of the Act (Pet. App. A, p. 10a.) which empowers the FCC to regulate interstate and foreign commerce in communication by wire and radio "so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." (47 U.S.C., §151.) The Court resolved this conflict by determining that the exemptions from FCC jurisdiction contained in Sections 2(b) and 221(b)

apply only to ". . . local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." (Pet. App. A, p. 13a.)

The NARUC respectfully submits that the language and intent of the pertinent sections of the Communications Act indicate that no conflict exists between Section 1, on the one hand, and on the other hand Sections 2(b) and 221(b). In pertinent part, Sections 2(b) and 221(b) provide:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . . [47 U.S.C. 152(b).]

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority. [47 U.S.C. 221(b).]

The plain language of Sections 2(b) and 221(b) provides restrictions on the authority of the FCC that might otherwise be construed from any other provision of the Act including Section 1. In enacting the Communications Act, Congress stated explicitly that the only qualification on the

restrictions of FCC jurisdiction contained in Sections 2(b)(1) and 221(b) is the Commission's radio licensing power under Section 301, and that the FCC would not have jurisdiction over intrastate and exchange facilities.

B. The Court of Appeals Decision is Contrary to the Legislative Intent of the Communications Act.

The legislative history of Sections 2(b) and 221(b) further indicates that Congress intended to restrict the authority of the FCC that might otherwise be construed to have been granted by the Communications Act. In enacting the Communications Act, the Congress sought to preserve the then existing State jurisdiction over intrastate and exchange communications. It also sought to insure that the *Shreveport* doctrine (*Houston, E.&.S.W.T. Ry. v. United States*, 234 U.S. 342 (1914), whereby the Interstate Commerce Commission was empowered to preempt State regulation of rates charged for intrastate transportation where it was shown that such rates had an adverse effect on interstate transportation) would not apply to the regulation of communications common carriers. The legislative history of Sections 2(b) and 221(b) demonstrates that these sections were included in the Communications Act in response to the above-described concerns.

When the Communications Act of 1934 was being considered by Congress, Senator Dill, Chairman of the Senate Committee on Interstate Commerce and Senate manager of the legislation, explained the rationale for including Sections 2(b) and 221(b) in the Act:

> We have attempted in Title I to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decision in other similar cases, has gone so far in the

> regulation of railroads that the so-called 'State regulation' amounts to very little. [78 Cong. Rec. 8823 (1934).]

Senator Dill's position is confirmed by the Senate Committee which fashioned the Act, since it expressly notes that the Act ". . . reserves to the State *exclusive* jurisdiction over intrastate telephone and telegraph communications." S. Rep. No. 781, 73d Cong., 2d Sess. at 3 (1934). (Emphasis added.)

The plain language and the intent of Sections 2(b) and 221(b) demonstrates that they are not in conflict with the authority granted the FCC in Section 1 of the Communications Act. Rather, these sections restrict the authority that the FCC might otherwise exercise on the basis of Section 1 and other provisions of the Act. The NARUC, therefore, respectfully submits that this Court should review the decision of the Court of Appeals sustaining the FCC's assertion of primary authority over the interconnection of customer provided equipment to the telephone network inasmuch as that decision relies on a construction of the Communications Act that is contrary to the plain language and intent of the Act.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE PRINCIPLES OF FEDERAL PREEMPTION

A. Congress Has Not Expressed an Intention to Preempt State Regulation of Terminal Equipment

As discussed in Part I, the decision of the Court of Appeals sustaining the FCC's preemption of State authority over the interconnection of terminal equipment avoids the plain language of Sections 2(b) and 221(b) of the Communications Act. The inclusion of these provisions in the

Act demonstrates that it was not the intent of Congress to permit the FCC to assert jurisdiction over all communications and facilities that have an effect on interstate commerce.

The FCC's preemption in this case, without regard for the limitations on its authority, violates the general principles of preemption. In areas such as that under consideration here, which is primarily of local concern, this Court has traditionally upheld State regulation against attempts of Federal preemption. Further, this Court has refused to give a federal agency jurisdiction over matters previously left to local regulation without a clear expression by Congress of its intent to do so.[10] In this case, the clear intent manifested by Congress in Sections 2(b) and 221(b) of the Communications Act is that State authority should not be preempted.

B. The Court of Appeals Interpretation of Sections 2(b) and 221(b) Would Render Those Sections Meaningless Insofar as They Refer to Facilities.

In order to sustain the FCC's preemption action, the Court of Appeals interpreted Sections 2(b) and 221(b) in a manner that would render those sections meaningless with regard to their reference to "facilities."

The Court of Appeals construed the exemptions from FCC jurisdiction in those sections to apply only to facilities that are "separable from and do not substantially affect the conduct or development of interstate communications." (Pet. App. A, p. 13a.) The Court of Appeals also found that "Usually it is not feasible, as a matter of economics and

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[10] *See*, e.g., *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 131 (1963); *FTC v. Bunte Bros.*, 312 U.S. 349, 354-55 (1941); *Palmer v. Massachusetts*, 308 U.S. 79, 84 (1939).

practicability of operation, to limit the use of such (terminal) equipment to either interstate or intrastate transmissions." (Pet. App. A, p. 9a.)

If the Court of Appeals' construction of Sections 2(b) and 221(b) is correct, the langauge exempting facilities used in intrastate and exchange services from FCC authority would be a nullity because, as the Court pointed out, there is no class of facilities used purely in intrastate service.

The NARUC, therefore, respectfully submits that the decision of the Court of Appeals is in error inasmuch as it relies on an interpretation of the Communications Act that contravenes the well-settled principle of statutory construction that all parts of a statute are to be given effect if possible.[11]

III. THE DECISION OF THE COURT OF APPEALS IS PREDICATED ON SEVERAL MISAPPREHENSIONS OF THE APPLICABLE LAW

A. The Court of Appeals Decision is Based on a Misreading of Section 2(b) of the Communications Act.

In determining that the exemptions provided for in Sections 2(b) and 221(b) apply only to local services and facilities that are separable from interstate communications, the Court of Appeals relied in part on the qualification in Section 2(b) which makes "local companies that provide interstate service solely through connection with the lines of telephone companies that are unrelated to them . . . amenable to the provisions of Sections 201 through 205 of the Act." (Pet. App. A, p. 10a.) The Court of

[11] See, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Cooperative Grain & Supply Co. v. Commissioner*, 407 F.2d 1158, 1162 (8th Cir. 1969); *Donaldson, Hoffman & Goldstein v. Gaudio*, 260 F.2d 333, 336 (10th Cir. 1958).

Appeals concluded that this qualification supports the FCC's assertion of primary jurisdiction over the interconnection of terminal equipment on the basis that no State regulation may encroach upon the Commission's jurisdiction over interstate and foreign communications under Sections 201-205. (Pet. App. A, p. 13a.)

The NARUC respectfully submits that the Court of Appeals overlooked the fact that the qualifying language in Section 2(b) does not apply to clause (1) which is the intrastate exemption. The qualifying language applies only to clauses (2), (3), and (4) and makes local carriers which engage in interstate service (by connection to the lines of another company) subject to Sections 201-205 which only concern interstate rates and services and not the intrastate and exchange rates and services referred to in Sections 2(b)(1) and 221(b).

B. The Reliance of the Court of Appeals Decision on Several FCC Decisions Is Misplaced.

In its decision, the Court of Appeals places its reliance on several FCC decisions to support the Commission's argument that it has for many years exercised control over terminal facilities and equipment used in connection with both interstate and intrastate communications. (Pet. App. A, pp. 15a-16a.) The NARUC respectfully submits, however, that these decisions are either clearly distinguishable from the present case, or they are decisions in which the FCC clearly limited the extent of its assertion of authority to interstate and foreign communications.

Among the cases cited by the Court of Appeals is *AT&T-TWX*, 28 FCC 1127 (1965). This decision is distinguishable from the present case inasmuch as it involved a claim of jurisdiction on the basis that the equipment involved was used predominently in interstate communications. Section

221(b) did not apply in that case because the equipment involved was used in teletypewriter service and not in telephone exchange service.

Another decision cited by the Court of Appeals, *United States Department of Defense v. General Telephone Co. of the Northwest*, 38 FCC 2d 803 (1973), *rev. denied*, FCC 73-854 (1973), *aff'd per curiam sub. nom. St. Joseph Tel. & Tel Co. v. FCC*, 505 F.2d 476 (D.C. Cir., 1974), is also distinguishable from the present case. That case involved the assertion of FCC jurisdiction over dial restoration panels used as an integral part of a special military communications network. In asserting Federal jurisdiction, the FCC found that there was no showing that the dial restoration panel had any "substantial and important" local capabilities.

In all the other FCC decisions cited by the Court[12] in support of the argument that the FCC has long exercised jurisdiction over terminal equipment used in both interstate and intrastate communications, the FCC limited its assertion of authority to the extent that the involved facilities were used for interstate or foreign communications.[13] The NARUC, therefore, respectfully submits that the Court of Appeals erred in determining that the FCC has in the past exercised jurisdiction over terminal equipment used in connection with both interstate and intrastate communications (Pet. App. A, pp. 15a-16a.)

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[12] *Use of Recording Devices*, 11 FCC 1033, 1047, 1054 (1947); *Katz v. AT&T*, 43 FCC 1328, 8 Pike & Fischer Radio Reg. 919, 923 (1953); *AT&T—Railroad Interconnection*, 32 FCC 337, 339 (1962); and *Hush-a-Phone Corp. v. AT&T*, 22 FCC 112, 114 (1953).

[13] See, *In the Matter of Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, Notice of Inquiry, Par. 9, 35 FCC 2d 539 (1972).

C. The Reliance of the Court of Appeals Decision on Section 410(c) of the Communications Act is Misplaced.

In its decision, the Court of Appeals referred to the existence of the Federal-State Joint Board procedure provided for in Section 410(c) of the Communications Act of 1934, as amended, to support its conclusion that Section 2(b) of the Act does not deprive the FCC of primary jurisdiction over the interconnection of terminal equipment. (Pet. App. A, pp. 15a, 11a-17a.) The Court of Appeals found that Congress, by enacting Section 410(c), ". . . has recognized the existence of areas of common national and state concern and has provided a procedure under which national primacy is recognized, yet the Commission is authorized to receive and consider information, views and proposals from concerned state agencies that may aid it in reaching informed and wise decisions." (Pet. App. A, p. 15a.)

The NARUC respectfully submits that the Congressional purpose in enacting Section 410(c) in 1971 was to strengthen the State role in communications issues generally affecting Federal/State relations, specifically as to separations matters but also as to any other matter relating to common carrier communications of joint Federal/State concern.[14] Section 410(c) neither broadens the FCC's former jurisdiction, nor does it provide any Congressional affirmation of the assertion of FCC jurisdiction over the interconnection of terminal equipment used in intrastate and exchange communications services. To the contrary, this section narrows FCC jurisdiction in that it mandates the referral of all proceedings regarding the jurisdictional separations of common carrier property and expenses between interstate and intrastate operations to a Federal-State Joint Board.

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[14]See, generally, S. Rep. 362, 92d Cong. 2d Sess. (1971).

The NARUC further respectfully submits that the Court's reliance on Section 410(c) of the Act is particularly misplaced in the present case. The fact that Congress was moved in 1971 to require the use of a Joint Board procedure in jurisdictional separations procedures constitutes a none-too-subtle hint that it deemed the FCC's efforts in recent years at meaningful Federal/State cooperation as leaving something to be desired.

The enactment of Section 410(c) was a clear statement of Congressional intention that there be meaningful cooperation between the FCC and the States on matters of joint concern. In the present case, however, the FCC refused to invoke this provision and refer the matter to a Federal/State Joint Board, even though the FCC had recognized that the matter was one of great concern to the States.[15]

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[15]In a letter to the then President of the NARUC, Ben T. Wiggins, dated September 26, 1973, then FCC Chairman Dean Burch solicited State Commission cooperation in the FCC proceeding below, pursuant to Section 410(b) of the Communications Act, due to the "obvious importance" to the State commissions of the issues raised in the proceeding. Under Section 410(b), the FCC is authorized "to hold joint hearings with any State Commission in connection with any matter with respect to which the Commission is authorized to act."

The NARUC declined the offer in a letter from Mr. Wiggins to Chairman Burch, dated October 11, 1973, noting that Section 410(b) provided "a very weak role for State commissioners since they have no real participation in the decision making process." The letter further noted that "[d]ue to the obvious inadequacy of the Section 410(b) procedure, the Congress in 1971 added Section 410(c) to the Act [47 U.S.C., Sec. 410(c)] which authorizes the use of a Federal-State Joint Board in any matter 'relating to common carrier communications of joint Federal-State concern.' " The chief difference in the two sections is that under Section 410(c) the State commissioners must be afforded an "opportunity to participate in its deliberations, but not vote" when the FCC has under consideration the recommended decision of the Joint Board. Mr. Wiggins, therefore, requested that the Joint-Board procedure provided for in Section 410(c) be used in this proceeding in

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The NARUC, therefore, respectfully submits that the Court of Appeals erred insofar as it relied on Section 410(c) to sustain the FCC's claim of primacy over the interconnection of terminal equipment to the national telephone network.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September 7, 1976

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[15](continued)
accordance with Congressional intent regarding proceedings of joint Federal-State interest.

Although the FCC had recognized the importance of the proceeding to State regulators in the letter from Chairman Burch, it denied the request for the Joint-Board procedure because "the question involved in Docket 19808 relates exclusively to the scope of this Commission's authority under the Communications Act with respect to interstate and foreign communications services." (Telegram dated October 29, 1973.)